2013 IL App (1st) 120766-U

FIFTH DIVISION
December 27, 2013

No. 1-12-0766

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 27398
	)	
XAVIER EDGECOMBE,	)	Honorable
	)	James L. Rhodes,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Justice McBride dissented, with opinion.

ORDER

¶ 1 *Held*: Where defendant stated the gist of a constitutional claim by alleging that he was absent during the reading and response to a jury note concerning the pivotal issue in his case and his appellate counsel was arguably ineffective for failing to raise this issue where the trial court failed to follow the committee notes in delivering the jury instruction on this

same issue, the trial court erred in dismissing defenandant's postconviction petition as frivolous and the case is remanded for second-stage proceedings.

¶ 2 In this postconviction appeal, defendant Xavier Edgecombe alleges that the trial court violated his right to a public trial by discussing a jury note in his absence. The State concedes that defendant was, in fact, absent during the discussion of the jury note.

¶ 3 Defendant was found guilty of the first-degree murder of Jerome Anderson, of the attempted first-degree murder of Antwon Walker, and of the aggravated battery with a firearm of Antwon Walker. Defendant, who testified at trial, admitted to shooting Anderson and Walker. As a result, the only issues at trial were self-defense and second-degree murder. The trial court originally sentenced defendant to 55 years' imprisonment for the murder, 25 years' imprisonment for the attempted murder, and 25 years' imprisonment for the aggravated battery, with all sentences to run concurrently. Defendant's conviction and sentence were affirmed on direct appeal (*People v. Edgecombe*, No. 1-06-2571 (2008) (unpublished under Supreme Court Rule 23)), and defendant then filed this postconviction petition.

¶ 4 This appeal is in an unusual procedural posture. Following the filing of defendant's original set of briefs in this postconviction appeal, we remanded for the limited purpose of resentencing "on one count of first-degree murder and one count of attempt murder." *People v. Edgecombe*, 2011 IL App (1st) 092690, ¶ 5. We specifically stated that we reserved judgement on any claims made by defendant in his original set of postconviction appellate briefs concerning the jury note, which included his claim that his appellate counsel was ineffective for failing to raise it as an issue. *People v. Edgecombe*, 2011 IL App (1st) 092690, ¶ 31. These claims relating to the jury note are now before us.

¶ 5 We observe that defendant's conviction for attempted murder is not at issue on this appeal. The sole issues raised by defendant on this appeal concern the jury note that asked the trial court to clarify what constituted an "unreasonable" belief in the need for self-defense, which could reduce a charge of first-degree murder to second-degree murder. Since the only conviction that could have possibly been affected by this note was the murder conviction, defendant's remaining conviction for attempted murder is not at issue on this appeal.

¶ 6 For the following reasons, we reverse the trial court's first-stage dismissal of his postconviction petition and remand for second-stage proceedings. First, defendant had a right to be present at the discussion of the jury note, and the parties concede that he was not present. Second, the trial court failed to discuss the jury note on the record, and thus we do not know whether defendant's counsel objected either to his absence or to the trial court's response to the note. All the parties concede that the attorneys were present. Third, the trial court erred by failing to provide the jury instructions in the manner specified by the committee's notes to the Illinois Pattern Jury Instructions, and the jury's note showed confusion about the same point. Fourth, the trial court's response, or failure to respond to the jury's question, appeared to be the pivotal moment of the case, since the jury returned with a verdict only 40 minutes later.

¶ 7 We also order the mittimus corrected, as both parties request, to reflect that, on resentencing, the trial court entered a sentence for attempted murder rather than aggravated battery, as the mittimus mistakenly states.

¶ 8 BACKGROUND

¶ 9 I. Evidence at Trial

¶ 10 In his brief on this appeal, defendant concedes that the following facts were established at trial:

> "On October 17, 2001, Xavier Edgecombe was beaten up by Reggie Anderson and five of Reggie's friends, in the presence of Edgecombe's girlfriend, Georgina Harris. The incident occurred at the intersection of 11th and Woodlawn in Chicago Heights. The precipitating event was an argument between Edgecombe and Reggie Anderson's friend, Antwon Walker, over an allegedly stolen dog. The fight was broken up by Reggie Anderson's brother Jerome, at the request of Harris.
>
> The next day, Edgecombe decided to settle his dispute with Reggie Anderson. He and Harris drove to the home of an acquaintance, where they

met with Edgecomb's cousin, John Coleman. Edgecomb asked Coleman to obtain a firearm for him. Later that day, Coleman pulled up his car besides Edgecomb's car and turned over a .22 caliber semi-automatic rifle.

Edgecombe drove to 11th and Woodlawn. Coleman followed in his vehicle. Jerome Anderson, Reggie Anderson, and Antwon Walker were present, as were several other people. Edgecombe directed Harris to open her window and recline her seat all the way back. He then fired several shots, and struck both Jerome Anderson and Walker. Jerome Anderson died of his wounds. Edgecombe then drove away, first crashing his car into a parked vehicle. As he drove away, Edgecombe fired several more shots out the front passenger side window. He then instructed Harris to throw the firearm out the

> window. ***
>
> On October 21, Edgecomb was interviewed by Detective Patrick Foley. Edgecombe admitted that he shot Anderson and Walker, adding that before he fired his gun, he saw somebody named Marcello Hatten (a.k.a 'Gooky') reach into his jogging suit. However, Edgecombe also told Foley that he never saw anything in Hatten's hands."

¶ 11 In addition, during his trial testimony, defendant testified as follows. Prior to the shooting on October 18, he stopped his vehicle on 11th Street beside a green van. Hatten emerged from the van and pointed a black semi-automatic handgun at defendant. In fear for his life, defendant lifted his gun and started shooting. Defendant testified that his initial shots were in self-defense against Hatten, and that his final two shots were in the air, in an effort to disperse the crowd.

¶ 12 II. Jury Note

¶ 13 The jury was instructed on both self-defense and second-degree

murder. The jury was instructed that it could convict defendant of second-degree murder if it found, first, that the State had proven the elements of first-degree murder beyond a reasonable doubt and, second, that a preponderance of the evidence supported the alleged mitigating factor that defendant held a belief, although it was unreasonable, that he was justified in using deadly force in self-defense. Explaining second-degree murder, the trial court stated:

> "You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have determined that the State has proved beyond a reasonable doubt each of the previously stated propositions.
>
> The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. By this, I mean that you must be persuaded, considering all the evidence in this

> case, that it is more probably true than not true that the following mitigating factor is present: that the defendant, at the time he performed the acts which caused the death of Jerome Anderson, believed the circumstances to be such that they justified the deadly force he used, but his belief that such circumstances existed was unreasonable."

¶ 14 No instructions were requested or given on either involuntary manslaughter or reckless discharge of a firearm. The trial court read the instructions aloud to the jury and then provided the written instructions to the jury during its deliberations.

¶ 15 During its deliberations, the jury submitted the following note to the trial court:

> "Can we get someone to give us some clarity around 'mitigating* factor'? We find the language in the instructions to be confusing.
>
> (*) See underlined portion of instructions."

The jury note was accompanied by the jury instruction on second-degree

murder. The jury circled and starred the portion that appears below:

> "By this, I mean that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true that the following mitigating factor is present: that the defendant, at the time he performed the acts which caused the death of Jerome Anderson, <u>believed the circumstances to be such that they justified the deadly force used, but his belief that such cirucmstances existed was unreasonable.</u>"

The portion that is underlined above is the portion that the jury underlined.

¶ 16 There is no transcript of the discussion of the jury note. The trial transcript indicates that the jury retired to deliberate, and the trial court and counsel then discussed what exhibits would be allowed in the jury room. A recess was taken immediately after the discussion of the exhibits. The next event indicated by the trial transcript is the court's gathering of the parties for the announcement of the jury verdict.

¶ 17 Although the record does not contain a transcript of the

discussion regarding the note, the State conceded in its brief to this court that defendant was, in fact, absent during it.[1]

¶ 18 On the back of the jury note concerning unreasonable belief, the trial court wrote: "I cannot further define it. Please continue to deliberate. Judge Donnelly."

¶ 19 The jury sent a second note which is not at issue in this appeal. The second note stated: "Can we get the transcribed notes?" On the back of this note, the trial court wrote: "We do not have all the transcripts. Are you looking for something in particular? Please let me know. Judge Donnelly." Underneath the judge's note, the jury apparently wrote back "John Coleman Chyna Higgins," who were two of the State's witnesses at trial.

¶ 20 The jurors sent out the note concerning unreasonable belief at 4:25

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[1]In addition, during a hearing on a posttrial motion, defense counsel stated that "both trial counsel" would state that defendant was not present and that only "the State, the Court and his trial counsel were present." Although the defense counsel who argued the posttrial motion was not the trial counsel, both the trial judge and the prosecutor had also been present at trial, and they did not correct him.

p.m., and they returned with a verdict at 5:05 p.m.[2]

¶ 21 III. Procedural History

¶ 22 On January 21, 2005, defendant was convicted of the first-degree murder of Jerome Anderson, of the attempted first-degree murder of Antwon Walker, and of the aggravated battery with a firearm of Antwon Walker. The jury also found that, during the commission of the murder, defendant personally discharged a firearm that proximately caused the death of Jerome Anderson.

¶ 23 On February 16, 2005, the trial court sentenced defendant to 55 years' imprisonment for murder, and two concurrent sentences of 25 years' imprisonment for attempted murder and aggravated battery with a firearm. The trial court ordered the murder sentence to run concurrently to the sentences for attempted murder and aggravated battery.

¶ 24 In a posttrial motion for a new trial, filed August 30, 2006, defendant raised a number of claims, including claims that the trial court erred by

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[2]During the hearing on August 31, 2006, on defendant's posttrial motion, the prosecutor, who was present during defendant's trial, stated that the jurors sent out the note at 4:25 p.m. and they returned with a verdict at 5:05 p.m.

failing to answer the jury's question about unreasonable belief and by failing to have defendant physically present for the discussion of the note. On August 30, 2006, the trial court denied his posttrial motion for a new trial, and on August 31, 2006, defendant filed a notice of appeal from the order of judgment and conviction.

¶ 25 After a direct appeal by defendant, the appellate court affirmed defendant's convictions in an unpublished order filed on May 12, 2008. *People v. Edgecombe*, No. 1-06-2571 (2008) (unpublished under Supreme Court Rule 23). On May 18, 2009, defendant filed a *pro se* postconviction petition, which the circuit court dismissed on August 7, 2009, as frivolous and patently without merit.

¶ 26 In his *pro se* postconviction petition, defendant raised two claims relating to the jury note and his absence during the discussion of it. In support, defendant attached three affidavits from (1) defendant, (2) defendant's mother and (3) defendant's brother, all attesting to the fact that defendant was not present during the discussion of the jury note. In his affidavit, defendant stated that he did not learn about the jury note until he was later informed by his mother and brother. As stated above, the State

concedes that defendant was not present during the discussion of the jury note.

¶ 27 The circuit judge who heard these postconviction claims was not the same judge who had sat at defendant's trial. Explaining his denial of these two postconviction claims, the circuit judge stated:

> "Claim No. 6 alleges an *ex parte* communication between the Judge and the jury.
>
> There is an affidavit that is attached from the defendant's mother, but from reading the record, it does not appear that there was any *ex parte* communications and everything that was done was done on the record.
>
> Number 7 deals with the Judge answering a question from the juror defining what a – or strike that, refusing to define what a, quote, mitigating factor was instead told the jury to continue to deliberate.
>
> That, again, is not of a constitutional basis."

In the above ruling, the circuit court presumed that "everything was done on the record." However, as the State now concedes, there was no transcript of the discussion of the jury note.

¶ 28 Defendant filed a notice of appeal on September 10, 2009. In December 2010, defendant sought to file supplemental appellate *pro se* briefs, but his motion was denied by the second division of this court. His briefs were returned to him, so they are not a part of the record on this appeal.

¶ 29 IV. Facts Relating to Our Prior Correction of the Mittimus

A. Sentencing

¶ 30 The briefs originally filed in this postconviction appeal reflected confusion among the parties about whether the 55-year sentence for the murder of Jerome Anderson ran concurrently or consecutively to the 25-year sentence for the shooting of Antwon Walker. As a result, this court ordered supplemental briefing about whether the mittimus should be corrected. Below are the facts relating to this issue.

¶ 31 At the sentencing on February 16, 2005, the trial court stated:

"On Count[s] 1, 2 and 3, which are the murder

charges, you are sentenced to fifty-five years in the Illinois Department of Corrections.

These will be concurrent sentences.

As to Counts 10 and 11, the attempt murder charges, you will be sentenced to 25 years in the Illinois Department of Corrections.

Those will be concurrent with the fifty-five years [*sic*] Illinois Department of Corrections."

In sum, the trial court directed the sentences for counts 1, 2 and 3 to run concurrently, and the sentences for counts 10 and 11 to run concurrently with the sentences for counts 1, 2 and 3. Concurrent terms would result in a total of 55 years' imprisonment

¶ 32 In contrast, the mittimus ordered a total imprisonment of 80 years. The mittimus, which was entered on February 16, 2005, stated that the sentences for counts 1, 2 and 3 are to run concurrently, and that the sentences for counts 10 and 11 are to run concurrently.

¶ 33 However, the mittimus did not state that the sentences for counts 1, 2 and 3 (55 years) are to run concurrently with the sentences for counts 10 and

11 (25 years). This contradicted the trial court's specific ruling that the 25-year sentence "will be concurrent with the fifty-five years [*sic*] Illinois Department of Corrections."

¶ 34 On direct appeal, this court stated in an unpublished order that "[t]he trial court sentenced defendant to 55 years for murder to run *consecutively* with 2 concurrent 25-year terms for attempted murder and aggravated battery with a firearm." (Emphasis added.) *People v. Edgecombe*, No. 1-06-2571 (2008) (unpublished under Supreme Court Rule 23). This statement comported with the mittimus, but contradicted the trial court's oral imposition of sentence.

¶ 35 In the original briefs on this postconviction appeal, neither party asked us to correct the mittimus. However, the parties' briefs asserted different sentences. The State's brief asserted a cumulative imprisonment of 55 years, while the defendant's brief asserted a substantially longer cumulative imprisonment of 80 years.

¶ 36 The State's original appellate brief stated: "the trial judge sentenced petitioner to a prison term of 55 years for murder and 25 years for aggravated battery with a firearm and attempted murder, to be served

concurrently." (Emphasis added.) In contrast, the defense brief stated that defendant was "sentenced to 55 years' imprisonment for murder, to run *consecutively* with two concurrent 25 year terms of imprisonment for attempt murder and aggravated battery with a firearm." (Emphasis added.)

¶ 37 B. The Charges

¶ 38 There also appeared to be some confusion by the trial court at sentencing about the counts for which defendant was being sentenced.

¶ 39 The grand jury returned a 15-count indictment.

¶ 40 Counts 1 through 7 all charged the first-degree murder of Jerome Anderson. Counts 8 through 15 all concerned the shooting of Anwtwon Walker: attempted first-degree murder (counts 8 and 9); aggravated battery with a firearm (count 10); attempted first-degree murder (count 11); aggravated discharge of a firearm (count 12); and aggravated battery (counts 13 through 15).

¶ 41 On January 21, 2005, the jury returned four unanimously-signed verdict forms: for the first-degree murder of Jerome Anderson; for the fact that, during the commission of the offense of first-degree murder, the defendant personally discharged a firearm which proximately caused the

death of Jerome Anderson; for aggravated battery of a firearm to Antwon Walker; and for attempted first-degree murder of Antwon Walker. The appellate record contains both the signed forms, as well as a transcript of the trial court's reading them into the record after the jury returned with its verdict.

¶ 42 Although the jury returned only four signed verdict forms, the trial court stated that it was sentencing defendant on five counts. The trial court stated that it was sentencing defendant on three first-degree murder counts for the single murder of Jerome Anderson. In addition, the trial court stated that counts 10 and 11 were "the attempt murder charges," when actually only count 11 was an attempted murder charge. Count 10 was a charge for aggravated battery with a firearm.

¶ 43 Count 1 accused defendant of first-degree murder. Count 2 added that "during the commission of the offense he personally discharged a firearm that proximately caused death." Count 3 included the added line from count 2, and also added that defendant shot and killed the deceased "knowing that such act created a strong probability of death or great bodily harm to Jerome Anderson." The line from count 2 was in one of the signed

verdict forms but not the line from count 3.

¶ 44 Like the trial court, the mittimus also stated that defendant was found guilty on five counts, namely, counts 1, 2, 3, 10 and 11. However, unlike the trial court, the mittimus stated that only one of the counts concerning Walker was an attempt count. As previously stated, counts 1 through 3 were counts for the first-degree murder of Jerome Anderson. Count 10 was for the aggravated battery with a firearm of Antwon Walker. Count 11 was for the attempted first-degree murder of Antwon Walker.

¶ 45 As a result of this apparent confusion by the parties to this appeal, as well as the court below, we ordered supplemental briefing to clarify these basic issues, such as what was defendant's sentence and on what counts was he convicted.

¶ 46 On June 30, 2011, this court remanded for resentencing on one count of first-degree murder and one count of attempted murder. We also held that, while a 25-year enhancement for personally discharging a firearm applied to the first-degree murder conviction, it did not apply to the attempted murder conviction. *Edgecombe*, 2011 IL App (1st) 092690, ¶ 5.

¶ 47 We also held: "Our action today does not affect the claims that

defendant made concerning the jury note. Since defendant may decide not to pursue these claims depending on the outcome of his resentencing, it is in the interest of judicial economy for us not to address these claims prematurely." *Edgecombe*, 2011 IL App (1st) 092690, ¶ 31.

¶ 48 V. Resentencing

¶ 49 On remand, the trial court sentenced defendant to a 45-year sentence for the murder and to a consecutive six-year sentence for attempted murder. The total of 51 years was four years less than defendant's original sentence. The trial court also denied a *pro se* posttrial motion by defendant which alleged essentially the same claims that were made in his *pro se* postconviction petition. Defendant filed a notice of appeal, and this appeal followed.

¶ 50 ANALYSIS

¶ 51 On this appeal, the issue before us is whether defendant's postconviction petition raised an arguably meritorious constitutional claim and whether the trial court thus erred by summarily dismissing it. Defendant argues that his due process rights were violated by his absence during the discussion of a jury note on the sole issue before the jury. As

noted above, the State concedes that he was absent.

¶ 52 For the reasons discussed below, we reverse the trial court's dismissal, remand for second-stage proceedings, and order the mittimus corrected as both parties request.

¶ 53 I. Mittimus Corrected

¶ 54 First, we order the mittimus corrected. Defendant asks us to correct the mittimus to reflect that he received a six-year sentence for attempted murder rather than aggravated battery with a firearm, and the State agrees. While the trial court stated that defendant was to serve the six-year sentence for attempted murder, the mittimus mistakenly reflects a six-year sentence for aggravated battery with a firearm. Therefore, we order the mittimus corrected to reflect that the six-year sentence is for attempted murder rather than aggravated battery. Now we turn to the substance of defendant's post-conviction appeal.

¶ 55 II. Stages of a Postconviction Proceeding

¶ 56 This appeal came to us after a first-stage summary dismissal of a post-conviction petition.

¶ 57 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*.

(West 2000)) provides a means by which a defendant may challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006) (citing *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005)). To be entitled to postconviction relief, a defendant must show that he or she has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. 725 ILCS 5/122-1(a) (West 2000); *Pendleton*, 223 Ill. 2d at 471 (citing *Whitfield*, 217 Ill. 2d at 183).

¶ 58 The Act provides for three stages, in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it, if the trial court finds that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000); *Pendleton*, 223 Ill. 2d at 472. If the trial court does not dismiss the petition within that 90-day period, the trial court must docket it for further consideration. 725 ILCS 5/122-2.1(b) (West 2000); *Pendleton*, 223 Ill. 2d at 472.

¶ 59 The Illinois Supreme Court has held that, at this first stage, the trial

court evaluates only the merits of the petition's substantive claim, and not its compliance with procedural rules. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). The issue at this first stage is whether the petition presents " ' "the gist of a constitutional claim." ' " *Perkins*, 229 Ill. 2d at 42 (quoting *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002), quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). As a result, "[t]he petition may not be dismissed as untimely at the first stage of the proceedings." *Perkins*, 229 Ill. 2d at 42.

¶ 60 In the case at bar, defendant's petition was dismissed at the first stage. However, if it had proceeded to the second stage, the Act provides that counsel may be appointed for defendant, if defendant is indigent. 725 ILCS 5/122-4 (West 2000); *Pendleton*, 223 Ill. 2d at 472. After an appointment, Supreme Court Rule 651(c) requires the appointed counsel: (1) to consult with petitioner by mail or in person; (2) to examine the record of the challenged proceedings; and (3) to make any amendments "that are necessary" to the petition previously filed by the *pro se* defendant. Ill. S. Ct. R. 651(c) (eff. Dec. 1, 1984); *Perkins*, 229 Ill. 2d at 42. Our supreme court has interpreted Supreme Court Rule 651(c) also to require appointed counsel "to amend an untimely *pro se* petition to allege any available facts

necessary to establish that the delay was not due to the petitioner's culpable negligence." *Perkins*, 229 Ill. 2d at 49.

¶ 61 The Act provides that, after defense counsel has made any necessary amendments to the petition, the State may move to dismiss it. *Pendleton*, 223 Ill. 2d at 472 (discussing 725 ILCS 5/122-5 (West 2000)). See also *Perkins*, 229 Ill. 2d at 43. If the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage. *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998). A trial court is foreclosed "from engaging in any fact-finding at a dismissal hearing because all well-pleaded facts are to be taken as true at this point in the proceeding." *Id.* at 380-81.

¶ 62 At a third-stage evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2000). In the case at bar, defendant asks us to reverse the trial court's dismissal of his petition as frivolous and remand for second-stage proceedings.

¶ 63 III. Standard of Review

¶ 64 The question of whether a trial court's summary first-stage dismissal

was in error is purely a question of law, which an appellate court reviews *de novo*. *Petrenko*, 237 Ill. 2d at 496; see also *Pendleton*, 223 Ill. 2d at 473.

¶ 65 Our supreme court has held that a trial court may summarily dismiss a petition as frivolous only if it has no arguable basis either: (1) in law; or (2) in fact. *Petrenko*, 237 Ill. 2d at 496 (citing *People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). Our supreme court has explained that (1) a petition lacks an arguable basis in law "if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record"; and that (2) it lacks an arguable basis in fact "if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic or delusional." *Petrenko*, 237 Ill. 2d at 496 (citing *Hodges*, 234 Ill. 2d at 16-17).

¶ 66 IV. Ineffective Assistance of Counsel

¶ 67 In his original briefs in this postconviction appeal, defendant claimed that the counsel on his direct appeal was ineffective for failing to raise the issue of defendant's absence during the discussion of a jury note. After resentencing, there was some confusion about the procedural posture of the case and defendant argued in his second set of briefs in this postconviction appeal that this was a direct appeal. However, since the issue of appellate

counsel's ineffectiveness was fully briefed by both parties in their first set of briefs in this appeal, we consider it below. We had previously stated that we would refrain until after resentencing from considering any "claims that defendant made concerning the jury note" which included his ineffectiveness claim and his claim that the trial court's substantive response to the jury note was incorrect. *People v. Edgecombe*, 2011 IL App (1st) 092690, ¶ 31.

¶ 68 In Illinois, claims of ineffective assistance of counsel are governed by the rule set forth in the United States Supreme Court case of *Strickland v. Washington*, 466 U.S. 668 (1984), which was adopted by the Illinois Supreme Court in the case of *People v. Albanese*, 104 Ill. 2d 504 (1984). *Petrenko*, 237 Ill. 2d at 496.

¶ 69 The *Strickland* rule is a two-prong test. To prevail, a defendant must show both (1) that counsel's performance was deficient; and (2) that this deficient performance prejudiced defendant. *Petrenko*, 237 Ill. 2d at 496 (citing *Strickland*, 466 U.S. at 694). To satisfy the first prong, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms; and to satisfy the second prong, a defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Petrenko*, 237 Ill. 2d at 496-97 (citing *Strickland*, 466 U.S. at 694). Although the *Strickland* test is a two-prong test, our analysis can proceed in any order. If a court finds that defendant was not prejudiced, it may dismiss on that basis alone, without further analysis. *Albanese*, 104 Ill. 2d at 527.

¶ 70 The *Strickland* rule applies with equal force to claims directed at appellate counsel, as it does to claims directed at trial counsel. *Petrenko*, 237 Ill. 2d at 497 (citing *People v. Golden*, 229 Ill. 2d 277, 283 (2008)). To succeed on a claim that appellate counsel was ineffective, defendant must show both that appellate counsel's representation was deficient and that, but for this deficient representation, there is a reasonable probability that defendant's appeal would have succeeded. *Petrenko*, 237 Ill. 2d at 497 (citing *Golden,* 229 Ill. 2d at 283).

¶ 71 Combining the standard for a first-stage summary dismissal with the standard for ineffective assistance of appellate counsel, our supreme court has held that a postconviction petition alleging ineffective assistance of

appellate counsel may not be summarily dismissed if: "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that defendant was prejudiced." *Petrenko*, 237 Ill. 2d at 497 (citing *Golden*, 229 Ill. 2d at 283).

¶ 72 In sum, if we find that it is arguable whether appellate counsel was deficient and whether this deficiency prejudiced defendant, we must reverse the summary dismissal and remand for second-stage proceedings.

¶ 73 V. Right to be Present

¶ 74 Now we consider whether appellate counsel's performance was deficient for failing to raise defendant's absence during the discussion of a jury note. As stated above, the State concedes that defendant was absent during this discussion.

¶ 75 Defendant claims that his absence during the discussion of a jury note violated his constitutional right of presence. Both the Illinois Constitution and the United States Constitution provide a right of presence. *People v. McLaurin*, 235 Ill. 2d 478, 490 (2009). Both constitutions provide that "[a] criminal defendant has a constitutional right to a public trial, and to appear and participate *in person and by counsel* at all proceedings that involve his

substantial rights." (Emphasis in original.) *People v. McDonald*, 168 Ill. 2d 420 (1995) (citing both U.S. Const., amend. VI, and Ill. Const. 1970, art. I).

¶ 76 In Illinois, the right of presence is guaranteed by both our constitution and our code of criminal procedure. Section 8 of article 1 of the Illinois Constitution provides that: "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel." Ill. Const. 1970, art. I, § 8. The Illinois Code of Criminal Procedure of 1963 states that: "A trial by the court and jury shall be conducted in the presence of the defendant unless he waives the right to be present." 725 ILCS 5/115-4(h) (West 2008).

¶ 77 The right of presence stems from common law. *People v. McGrane*, 336 Ill. 404, 408 (1929). Under common law, it was required that a defendant, who was accused of a felony, be present throughout the trial, and that the record state the fact of his presence. *McGrane*, 336 Ill. at 408. In the early part of the 20th century, it was the law in Illinois that, if a trial court responded in the defendant's absence to a note from the jury, a reviewing court would not even inquire into the correctness of the instruction given. *McGrane*, 336 Ill. at 409 ("Inquiry will not be made into

the correctness of the instruction given ***."); *Childs*, 159 Ill. 2d at 227 ("For many years, it was a strict rule ***."). The error was not cured by the presence of defendant's counsel, and reversal was required. *McGrane*, 336 Ill. at 409.

¶ 78 Under present-day Illinois law, a criminal defendant still has a right to be present at every stage of his or her trial. *McLaurin*, 235 Ill. 2d at 490. There is also no question that jury deliberations, the stage at issue at the case at bar, are still considered "a critical stage of the trial affecting a defendant's substantial rights." *McDonald*, 168 Ill. 2d at 459 (citing *Childs*, 159 Ill. 2d at 234). However, unlike either the common law or prior law in Illinois, the current right to be present is neither absolute nor inflexible. *McLaurin*, 235 Ill. 2d at 491 (citing *People v. Bean*, 137 Ill. 2d 65, 81-82 (1990); *Childs*, 159 Ill. 2d at 227 ("the rule has judicially evolved")). A defendant's right of presence is violated under current Illinois law only when the defendant's absence impaired an underlying substantial right, such as the right to present a defense or the right to a fair jury. *McLaurin*, 235 Ill. 2d at 491 (citing *Bean*, 137 Ill. 2d at 81).

¶ 79 Our supreme court held in *McLaurin* that a defendant's exclusion

from a discussion of jury notes did not violate his constitutional right to be present, where "the jury notes were all either straightforward requests for portions of testimony or notes claiming that the jury was 'deadlocked.' " *McLaurin*, 235 Ill. 2d at 491. *Cf. People v. Childs*, 159 Ill. 2d 217, 234 (1994) ("because jury deliberations are a critical stage of trial affecting substantial rights, a defendant has an absolute right to be informed of any jury question involving a question of law and to be given the opportunity to participate for his protection in fashioning an appropriate response"); *McDonald*, 168 Ill. 2d at 459 ("a communication between the judge and the jury after the jury has retired to deliberate, except one held in open court and in defendant's presence, derives defendant of those fundamental rights" to appear and participate).

¶ 80 To grasp the full import of *McLaurin*, we must understand what our supreme court did, and what it did not do. Our supreme court could have announced a blanket rule for Illinois: that a defendant's Illinois right of presence is not violated by his or her absence from a discussion of jury notes, so long as his or her counsel is present. However, our supreme court chose *not* to issue such a blanket rule. Thus, there must be some instances

when a defendant's absence during a discussion of jury notes *does* violate his or her Illinois right to presence, even though counsel is present.

¶ 81 There are good reasons for not issuing a bright-line rule. There are instances when responding to jury notes is almost a routine or administrative task, such as the "straightforward requests" for testimony that occurred in *McLaurin* However, there are other instances when responding to jury notes may be the pivotal moment of a case. *Eg*., *Childs*, 159 Ill. 2d at 225, 234-35 (a trial court's failure to clarify whether a conviction on an armed robbery count meant that defendant must be found guilty of murder rather than manslaughter, as requested by a jury note, was "improper" and required reversal); *McGrane*, 336 Ill. at 407-08 (the trial court informed the jury at 10:30 p.m., per their request, what the sentences were for the respective charges, and less than a half-hour later they returned a verdict). The job of an appellate court then becomes trying to draw the line between those instances, like *McLaurin*, where the right was not violated; and those instances where it was.

¶ 82 In *McLaurin*, our supreme court found no plain error, where defendant "pointed to no substantive right that was impaired by the trial

court's decision to proceed in his absence." *McLaurin*, 235 Ill. 2d at 491. Our supreme court explained that "[a]lthough defendant argues that he could have given input into the trial court's answers, *it is significant* that he does not argue that the substance of any of the responses was improper." (Emphasis added.) *McLaurin*, 235 Ill. 2d at 491. Since "the jury notes were all either straightforward requests for portions of testimony or notes claiming that the jury was 'deadlocked,' " there was no plain error. *McLaurin*, 235 Ill. 2d at 491. See also *People v. Hickey*, 204 Ill. 2d 585, 621-23 (2001) (at the second stage, defendant's postconviction petition failed to allege how his absence violated his right to a fair trial, where the jury's five notes were all requests for testimony and evidentiary items).

¶ 83 VI. No Forfeiture

¶ 84 Since this is a postconviction petition and not a direct appeal, plain-error is not applied. However, we discuss plain-error in the context of defendant's claims about appellate counsel's ineffectiveness and that the claims were preserved so that appellate counsel could have raised them.

¶ 85 In considering whether defendant's appellate counsel was ineffective for failing to raise on appeal defendant's right to be present, we presume

that the reviewing court would have applied to this issue -- if it had been raised -- a harmless-error review, rather than a plain-error review.

¶ 86 Whether a reviewing court applies plain-error or harmless-error review "depends on whether defendant has forfeited review of the issue." *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). If a defendant preserved the issue for review, the reviewing court will conduct a harmless-error analysis. *Thompson*, 238 Ill. 2d at 611. However, if a defendant forfeited review of an issue, "the reviewing court will consider only plain-error." *Thompson*, 238 Ill. 2d at 611; Ill. S. Ct. R. 615(a) (eff. Aug. 1, 1987) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court").

¶ 87 To preserve an alleged error for review, a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion." *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007).

¶ 88 Under the plain-error doctrine, a reviewing court may consider "unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threaten[s] to tip the

scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski,* 225 Ill. 2d at 565; *Woods*, 214 Ill. 2d at 471. With a plain-error analysis, "it is the defendant who bears the burden of persuasion with respect to prejudice." *Woods*, 214 Ill. 2d at 471; *Thompson*, 238 Ill. 2d at 613.

¶ 89 In the case at bar, we do not know whether defendant's trial counsel objected at trial to defendant's absence, because the proceedings regarding the note transpired off the record. As a result, we cannot say that defendant's trial counsel failed to preserve the issue with a contemporaneous objection. We *do* know that the issue was raised in a posttrial motion. Thus, we find that the claimed error was not forfeited and was preserved for appellate review.

¶ 90 Since it was preserved, the appellate court would have applied to the claim – if it had been raised – a harmless-error review. Even constitutional errors, such as violations of the right of presence, are subject to harmless-

error analysis. *McLaurin*, 235 Ill. 2d at 494-95. In a harmless-error analysis, the burden is on the State to prove beyond a reasonable doubt that no prejudice occurred. *McLaurin*, 235 Ill. 2d at 495. The primary difference between plain- and harmless-error review is that, in harmless-error analysis, "the State has the burden of persuasion with respect to prejudice." *McLaurin*, 235 Ill. 2d at 494-95.

¶ 91 In addition, defendant's claim is not barred for our review by the doctrines of *res judicata* and waiver. These doctrines limit postconviction relief to constitutional claims that have not been and could not have been raised earlier. *People v. English*, 403 Ill. App. 3d 121, 130 (2010) (citing *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002)). Issues that could have been raised in earlier proceedings, but were not, are considered waived for purposes of a postconviction proceeding. *English*, 403 Ill. App. 3d at 130 (citing *Pitsonbarger*, 205 Ill. 2d at 456). Defendant's claim about appellate counsel's ineffectiveness could not have been raised in an earlier proceeding.

¶ 92 VII. Deficiency of Appellate Counsel's Performance

¶ 93 Next we consider whether defendant's counsel on direct appeal was

ineffective for failing to raise on appeal the issue of defendant's absence at trial during the discussion of a jury note.

¶ 94 This claim involves a series of errors.

¶ 95 First, the trial court erred by failing to provide the jury instructions in the manner specified by the committee's notes to the Illinois Pattern Jury Instructions, and the jury's note showed confusion about the same point. Although the instructional error was forfeited, it sheds light on the jury's subsequent confusion and the trial court's missed opportunity to correct it. *Childs*, 159 Ill. 2d at 232 ("the error in giving the defective instruction was exacerbated by the trial court's failure to answer the jury's question and thereby correct the instructional error").

¶ 96 In its note, the jury underlined the words in Illinois Pattern Jury Instructions, Criminal, No. 7.06 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 7.06) which concerned defendant's "unreasonable" belief in the need for deadly force. The committee note to this instruction states: "When an affirmative defense instruction is to be given, *combine* this instruction with the appropriate instruction from Chapter 24-25.00." (Emphasis added.) IPI Criminal 4th No. 7.06, Committee Note, at 207. In the case at bar, the

affirmative defense instruction was IPI Criminal 4th No. 24-25.06, "Use of Force in Defense of a Person." Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000).

¶ 97 Combining these two instructions makes a lot of sense, since IPI Criminal 4th No. 7.06 concerns an unreasonable belief, while IPI Criminal 4th No. 24-25.06 concerns a reasonable belief. When the two instructions are placed side by side, each one adds clarity to the other. See *Rodriguez*, 336 Ill. App. 3d at 17 (the only distinction between second degree-murder and self-defense is whether defendant's belief in the need for force was reasonable or unreasonable).

¶ 98 The sample sets of instructions at the end of the pattern instructions make clear that the word "combine" means to read the two instructions side by side. There are two sample sets that contain both IPI Criminal 4th No. 7.06 and affirmative defense instructions. IPI Criminal 4th Sample Set 27.01 at 463; IPI Criminal 4th Sample Set 27.05 at 518. In both sets, the affirmative defense instructions appear either immediately before or immediately after IPI Criminal 4th No. 7.06.

¶ 99 By contrast, in the case at bar, the trial court did not "combine" the

instructions, as the committee note required, but rather it tacked the affirmative defense instruction to the end of an instruction for a different offense. Ill. S. Ct. R. 451(a) (eff. July 1, 2006) (trial court must use Illinois Pattern Jury Instructions, if accurate and applicable).

¶ 100 Second, when the jury sent out its note indicating its confusion about what constituted an "unreasonable" belief in the need for deadly force, the trial court erred by choosing to conduct the discussion of the note, off the record and out of the presence of defendant. We do not know how, or if, trial counsel asked the trial court to respond, since we lack a transcript of the discussion. *Childs*, 159 Ill. 2d at 234 ("because jury deliberations are a critical stage of trial affecting substantial rights, a defendant has an absolute right to be informed of any jury question involving a question of law and to be given the opportunity to participate for his protection in fashioning an appropriate response"); *McDonald*, 168 Ill. 2d at 459 ("a communication between the judge and the jury after the jury has retired to deliberate, except one held in open court and in defendant's presence, derives defendant of those fundamental rights" to appear and participate).

¶ 101 Third, the trial court erred by refusing to answer the jury's specific

legal question concerning the meaning of a defendant's "unreasonable" belief in the need for deadly force. See *Childs*, 159 Ill. 2d at 228-29 (the trial court has "a duty" to respond to a jury note that "requested clarification on a point of law"). As the committee note required, the trial court could have read, side by side, the two instructions concerning reasonable belief and unreasonable belief. Since defendant had already confessed to the shooting, the jury's understanding of what constituted a reasonable, as opposed to an unreasonable, belief in the need for deadly force governed the outcome of the only two issues in the murder case – self-defense and second-degree murder. *Childs*, 159 Ill. 2d at 229 (the trial court's duty to respond is particularly important when the jury note "manifested juror confusion on a substantive legal issue").

¶ 102 In the case at bar, the State argues that the case of *People v. McDonald*, 168 Ill. 2d 420, 458-61 (1995), is directly on point, where our supreme court upheld a trial court's refusal to further define the phrase "mitigating factor" for the purposes of a death penalty hearing, because the phrase was already clearly defined. The *McDonald* case is inapposite, because the phrase "mitigating factor" is defined differently when used in a

death penalty hearing than when it is used in a second-degree murder instruction. *McDonald*, 168 Ill. 2d at 460 (mitigating factors in a death penalty proceeding are defined as " 'any other reasons supported by the evidence why the defendant should not be sentenced to death' ") (quoting the instructions given in the case). In the case at bar, the jury indicated particular confusion with the "unreasonable" belief portion of the instruction, and that portion was not in the definition of "mitigating factor" as defined for purposes of a death penalty hearing. Thus, the *McDonald* case does not govern the outcome in the case at bar.

¶ 103 Fourth, the trial court's refusal to answer the jury's legal question appears to be the pivotal moment in the case, since the jury returned only 40 minutes later with a verdict. *McGrane*, 336 Ill. at 407-08 (the trial court informed the jury at 10:30 p.m., per their request, what the sentences were for the respective charges, and less than a half-hour later they returned with a verdict).

¶ 104 We find that it is arguable that appellate counsel's performance fell below an objective standard of reasonableness when he failed to raise this possibly meritorious claim that had been preserved for appellate review.

We find that it is arguable that defendant suffered prejudice as a result, in light of the merits of the underlying claim. The error presented by defendant's absence was compounded by the trial court's error in failing to provide the jury instructions as the committee notes required.

¶ 105 We also observe that this was the same appellate counsel who failed to raise a 25-year discrepancy between the sentence ordered and the sentence as described in the mittimus; that the circuit judge who heard the postconviction claims was not the same judge who presided over defendant's trial; and that the circuit judge's summary dismissal was based, in part, on the erroneous factual assumption that the discussion of the jury note was on the record.

¶ 106 For all these reasons, we reverse the summary dismissal of defendant's postconviction petition and remand for second-stage proceedings.

¶ 107 CONCLUSION

¶ 108 For all the reasons stated above, we reverse the trial court's summary dismissal of defendant's postconviction petition. First, defendant had a right to be present at the discussion of the jury note and the State concedes

that he was not present. Second, since the trial court failed to discuss the jury note on the record, we do not know whether defendant's counsel objected either to his absence or to the trial court's response to the note. All the parties concede that counsel were present.

¶ 109 Third, the trial court erred by failing to provide the jury instructions in the manner specified by the committee's notes to the Illinois Pattern Jury Instructions, and the jury's note showed confusion about the same point. Fourth, the trial court's response, or failure to respond to the jury's question, appeared to be the pivotal moment of the case, since the jury returned with a verdict only 40 minutes later.

¶ 110 Lastly, we observe that the circuit judge's summary dismissal was based, in part, on the erroneous assumption that the discussion of the jury note was on the record.

¶ 111 In addition, we order the mittimus corrected to reflect that defendant's six-year sentence was for attempted murder rather than aggravated battery.

¶ 112 Reversed and remanded; mittimus corrected.

¶ 113 JUSTICE McBRIDE, dissenting.

¶ 114 For the following reasons, I respectfully dissent from the majority

decision to remand defendant's postconviction petition for second stage proceedings. I would affirm the decision of the circuit court.

¶ 115 In my opinion, defense counsel's representation on appeal was not deficient and defendant has not shown any prejudice so as to warrant second stage review. Set forth below are the legal principles upon which I base my dissent.

¶ 116 The purpose of postconviction proceedings is to allow inquiry into constitutional issues relating to the defendant's conviction or sentence that were not and could not have been determined on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived. *Id*. A postconviction petition may be dismissed at the first stage if the court determines the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012).

¶ 117 A petition will be considered frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition has no arguable basis in law when it is based on

" 'an indisputably meritless legal theory,' for example, a legal theory which is completely contradicted by the record." *People v. Morris*, 236 Ill. 2d 354, 354 (2010) (quoting *Hodges*, 234 Ill. 2d at 16). Similarly, a petition has no arguable basis in fact when it is based on a "fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. A fanciful factual allegation is one that is fantastic or delusional, or belied by the record. *Morris*, 236 Ill. 2d at 354. Further, under the Act, a petition containing nonspecific and nonfactual allegations that merely amount to conclusory statements will not survive dismissal. *Id*.

¶ 118 When the trial court examines a postconviction petition, the Act directs the court to examine the court file of the proceeding in which the defendant was convicted, any transcripts of the proceeding, and any action taken by an appellate court in the case. 725 ILCS 5/122-2.1(c) (West 2012).

¶ 119 Allegations of ineffective assistance of appellate counsel, specifically that appellate counsel was ineffective for not raising an issue on direct appeal, are evaluated under the same *Strickland* standards that govern the performance of trial counsel. *Barrow*, 195 Ill. 2d at 522. "Thus a defendant who alleges that appellate counsel was ineffective must show both a

deficiency in counsel's performance and prejudice resulting from the asserted deficiency. *Id*.

¶ 120 More specifically, as the majority observes, to demonstrate ineffective assistance of appellate counsel, defendant must establish that both counsel's representation was deficient and that, but for this deficient representation, there is a reasonable probability that defendant's appeal would have succeeded. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010).

¶ 121 Counsel on appeal is not obligated to brief every conceivable issue, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit. *Barrow*, 195 Ill. 2d at 522-23. Where the evidence of defendant's guilt is overwhelming, defendant cannot establish the requisite prejudice and a postconviction petition is properly dismissed in such a case. *Id*. at 524.

¶ 122 The general right to be present at every stage of the trial or the broad right to be present is not itself a substantial Illinois constitutional right, it is a lesser right the observance of which is a means to securing the substantial rights of a defendant. *People v. McLaurin*, 235 Ill. 2d 478, 490 (2009). A defendant's right of presence is violated under Illinois law only when the

defendant's absence results in the denial of an underlying substantial right, such as the right to confront witnesses, the right to present a defense, or the right to an impartial jury. *Id*. at 490-91. The federal constitutional right of presence is violated when a defendant's absence results in his being denied a fair trial. *Id*. at 492. That fairness must be determined in light of the whole record. *Id*.

¶ 123 On the issue of jury questions, our supreme court has held that:

> "A trial court may exercise its discretion and properly decline to answer a jury's inquiries where the instructions are readily understandable and sufficiently explain the relevant law, where further instructions would serve no useful purpose or would potentially mislead the jury, when the jury's inquiry involves a question of fact, or if the giving of any answer would cause the court to express an opinion which would likely direct a verdict one way or another." *People v. Childs*, 159 Ill. 2d 217, 228 (1994).

See also *McLaurin*, 235 Ill. 2d at 493 (the formulation of a response to a jury as to when a supplemental instruction to the jury is warranted is within the trial court's discretion).

¶ 124 Supreme Court Rule 451(a) requires Illinois Pattern Jury Instructions to be used by the trial court when applicable. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013).

¶ 125 The postconviction petition in the instant case involves only one claim: that appellate counsel was ineffective for failing to raise the issue of defendant's absence during the discussion of a jury question concerning the clarification of mitigation as defined in the second degree murder instructions. Here, the judge, the defense attorney, and the assistant state's attorney were all present for this discussion. Additionally, the court provided the jury with a response, essentially that it could not further define the instruction and that the jury should continue to deliberate. About 30 minutes after the court's response, the jury returned verdicts of guilty.

¶ 126 Defendant, through counsel, subsequently challenged his absence during the jury note discussion as a basis for a new trial. At that time the trial judge denied the motion and concluded that the jury's misunderstanding

was rooted in their having taken only a cursory look at the instruction, and that after proper consideration of the instructions, the jury was able to fully understand the instructions given.

¶ 127 In my opinion, defendant has not established that his right to be present was violated, because his attorney was present for the discussion, the instructions given clearly and succinctly stated the law, and any other instruction would not have assisted the jury in this case. *Childs*, 159 Ill. 2d at 228. Therefore, appellate counsel's performance was not deficient for not raising a non-meritorious issue on appeal.

¶ 128 As to the prejudice prong, I point out the following. The jury convicted defendant of first degree murder, attempt murder, and aggravated battery with a firearm. On direct appeal, we concluded that defendant could not establish ineffective assistance of trial counsel for counsel's failure to request jury instructions on involuntary manslaughter and the reckless discharge of a firearm. We held that neither *Strickland* prong could be satisfied based upon the evidence presented at defendant's trial. We set out the evidence at length, some of which I highlight and which I believe is undisputed.

¶ 129 This murder and attempt murder were committed by defendant in retaliation for a physical altercation that occurred the day before between defendant and another individual. Many of the individuals present for that altercation were present the next day when the shootings occurred. Multiple witnesses, including defendant's girlfriend, other friends of defendant, and the attempt murder victim, all testified that only defendant was armed with a gun when the shootings occurred. Even defendant conceded that no bullets were fired by any other gun after he fired the rifle. Although defendant testified at trial that he observed an individual on the street display a weapon that night, when he originally spoke to police he never said anyone in the crowd was armed that night.

¶ 130 The same witnesses who testified at defendant's trial also corroborated the fact that defendant went to the location of the shooting armed with a .22 gauge rifle to retaliate for the beating. The defendant fired the gun multiple times into the crowd of people who were just standing on the street. The defendant was shooting while he was in a car, and he was essentially picking off easy human targets. The victim who died, Jerome Anderson, was sadly the young man who broke up the fistfight the day

before. That homicide victim was shot in the back and arm. The other victim, Antwon Walker, was seriously wounded by the gunshots.

¶ 131 It is apparent that the jury rejected defendant's self-defense theory and his unreasonable belief to mitigate the murder to second degree, because it found defendant guilty of both first degree murder and attempt murder. Further, because an attempt murder conviction requires a finding of a specific intent to kill, the jury concluded that defendant's acts were intentional in this case.

¶ 132 In defendant's direct appeal, when we rejected claims of ineffective assistance of trial counsel, we responded to defendant's suggestion that he did not intend to shoot the victims that night with the following.

"Defendant may be confusing motive with intent. The evidence indicated defendant fired a rifle at the group of people on the north side of 11th Street. In so doing, he *intentionally* caused the death of Jerome Anderson and great bodily harm to Antwon Walker. These actions fall within the definitions of first degree murder and aggravated battery with a firearm." [Emphasis added]. *People v. Edgecombe*, No. 1-06-2571, slip op. at 23 (2008) (unpublished order under Supreme Court Rule 23).

¶ 133 Because the evidence presented at defendant's trial so overwhelmingly proved that defendant committed first degree murder and attempt murder, it is not legally or factually arguable that defendant was prejudiced.

¶ 134 Defendant's suggestion that the instruction should have been explained in lay person's terms is not supported by any persuasive authority and does not warrant further analysis.

¶ 135 *Childs*, the primary case the majority relies upon, does not present a factual situation like the instant case. In *Childs*, the jury question was telephoned to the judge while he was having dinner with the prosecutors who tried the case. The judge verbally instructed the bailiff to respond, "[y]ou have received your instructions as to the law, read them and continue to deliberate." *Childs*, 159 Ill. 2d at 225. The court did not notify defense counsel, defendant, or the prosecutors of the note until after the response had been given. *Id*. at 225-26. The question the jury posed in *Childs* was an "explicit question which manifested juror confusion on a substantive legal issue," asking whether the jury could find defendant guilty of armed robbery and voluntary or involuntary manslaughter, or whether murder was

"the only option with armed robbery." *Id*. at 225, 229. Under the law, that was not their only option and the jury needed to be apprised of this fact so as not to convict the defendant of murder based upon a flawed understanding of Illinois law. Moreover, the response the court gave was *ex parte* and was no response at all.

¶ 136 Here, in contrast, defendant's attorney, the State, and the judge discussed the jury's question in open court.

¶ 137 The majority holds that defendant's attorney was ineffective for not objecting to the order in which the instructions were given and that the trial judge erred in reading them in the order that he did. The sample set of instructions are just that, samples that trial judges can use. The defendant has never suggested that they had to be read in the order the majority proposes. I do not believe that the manner or order in which the instructions are read, when the content is an otherwise accurate statement of the law, amounts to a constitutional violation.

¶ 138 In my opinion, the Illinois Pattern Instructions used in this case were correct and read correctly to the jury. I also disagree that the word "combined" means that the instructions had to be read in a set format.

¶ 139 More important, there was no error in the manner in which the instructions were given to this jury. They were read in this order because defendant was claiming self defense, in addition to an unreasonable belief in the use of force in an attempt to mitigate murder to second degree. The murder, attempt murder, and aggravated battery charges, their elements, and the issues related to each offense had to be explained when the trial judge gave the instructions. In sum, the instructions fully, fairly, and simply explained the law that applied in this case.

¶ 140 The majority also suggests that the court should have explained the meaning of unreasonable belief and that placing reasonable belief and unreasonable belief next to each other would have clarified the instructions. However, reasonable and unreasonable are well understood words. In the context of criminal jury trials, it is well established that trial judges should not attempt to explain "reasonable" doubt. Here too, the court should not have attempted to define reasonable or unreasonable. The trial judge answered the question by telling the members of the jury that he could not further define the instruction. This was not an abuse of discretion, it was the appropriate response. I disagree that this failure was arguably a

constitutional violation.

¶ 141 This appeal is similar to *People v. McDonald*, 168 Ill. 2d 420 (1996), where during the death penalty sentencing phase, the jury sent out a note to the court that said:

> "Please specify what:
>
> (1) Mitigating Factor
>
> Any other reason supported by the evidence
>
> means? We are unclear on this one.
>
> (2) Is questioning his guilt a mitigating factor?"
>
> *McDonald*, 168 Ill. 2d at 458.

The defendant, who was *pro se*, was not informed of the question, but the court consulted with the prosecutor and the defendant's stand-by counsel. *Id*. In *McDonald*, the court responded: "You have the instructions! Continue to deliberate." *Id*. On direct appeal, the defendant argued that the failure to consult with the defendant denied the defendant his constitutional right to be present during a critical stage of the proceedings and that the judge's failure to meaningfully respond prejudiced the defendant. *Id*. Although the supreme court held the trial court erred when it consulted

stand-by counsel instead of the *pro se* defendant, it concluded the error was harmless. *Id*. at 460-61. The court further concluded that the defendant was not prejudiced where the original instruction on mitigation was readily understandable and sufficiently explained the law. *Id*.

¶ 142 Although the "mitigation" term in *McDonald* involved sentencing factors in a death penalty hearing, the question posed and the response given were similar. In addition, here defendant's actual attorney was present, the court explained it could not give further clarification, and the jury instructions were also readily understandable and sufficiently explained the law.

¶ 143 Based upon our prior decision and the conclusions we reached concerning defendant's inability to establish prejudice regarding trial counsel's failure to submit jury instructions on the reckless discharge of a firearm and involuntarily manslaughter, it is difficult to reconcile the majority's holding that defendant has established prejudice based on the same evidence.

¶ 144 Even if the response to the note was incorrect and even if defense counsel should have objected to the response and even if appellate counsel

was ineffective because of his failure to raise this issue on appeal, it is not arguable that the prejudice prong of *Strickland* can be met. The evidence presented against defendant was overwhelming. Our opinion essentially held that on direct appeal. Multiple witnesses, mostly friends of defendant, all testified that only defendant had a weapon that night. Defendant went there armed. One of his friends, who handed defendant the rifle earlier in the evening, did not continue on with the multiple vehicle caravan because he did not want to be a part of what was going to happen, a senseless murder with the enormous loss of a young life. Further, Jerome Anderson was shot in the back.

¶ 145 The fact that defendant was not present when the jury question was discussed did not arguably deny defendant any substantial constitutional right and his absence did not arguably deny defendant a fair trial. Finally, even assuming appellate counsel's performance was deficient, given the evidence presented it cannot be said that there is a reasonable probability that defendant's appeal would have succeeded. *Petrenko*, 237 Ill. 2d at 497.

¶ 146 Although the pleading threshold is low for first stage proceedings under the Act, the mere allegation of ineffective assistance of appellate

counsel cannot be the barometer of whether the petition can survive first stage dismissal. The allegation of not being present for a jury question, when defense counsel was present for the response, cannot in itself pass the constitutional violation test for the right of presence is not a substantial Illinois constitutional right. The allegation that a jury response of this kind, that is otherwise proper, or that the Illinois Pattern Instructions were not read in a particular order, do not amount to an arguable constitutional violation.

¶ 147 I would affirm the dismissal of the instant postconviction petition.